SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1227

MARVIN G. RUSSELL, RECEIVER,

Petitioner,

vs.

ATLANTA FLOORING & INSULATION CO., INC., ET AL., PETITIONING CREDITORS AND W. A. FULLER, RECEIVER AND TRUSTEE FOR S. YOSHINUMA, BANKRUPT

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit in this case is contained in the record at pages 45 to 49, inclusive; and a further opinion on rehearing is contained in the record at pages 66-73 inclusive; and are contained in the official reports at——

The opinion on rehearing, however, as it appears in the advance sheets of the Federal Reporter is subject to correction. The corrections have been made in the certified record.

II

Jurisdiction

The jurisdiction of this Court is discussed in Section II, page 14 of the petition.

III

Statement of the Case

The petition contains a statement of the relevant facts. Reference to the facts will be made and repeated in this brief only as may be necessary to a discussion of the questions involved.

IV

Specification of Errors

The errors assigned and relied on by petitioner are as follows:

(1) The Circuit Court of Appeals erred in reversing the holding by the District Court that under the provisions of Section 2, subsection a(21) of the Bankruptcy Act (11 U. S. C. A. 11 a(21)) the Bankruptcy Court is without jurisdiction, by summary proceedings, to require either delivery or accounting, where the non-bankruptcy receiver was appointed and took possession of the res more than four months before bankruptcy (R. 15, 16, 17); in that said Section provides:

> "That such delivery and accounting shall not be required except in proceedings under Chapters X and XII of this Act if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy";

in that the bankruptcy proceeding in this case is not a proceeding under either Chapters X or XII of the Bankruptcy

Act (R. 12, case 359); and that the State Court receiver in this case, having been appointed and having taken possession of the res more than four months prior to bankruptcy (R. 13-31)(R. 12-39, Case 359), the Bankruptcy Court was without jurisdiction to require either delivery or accounting from petitioner, and, hence, the holding in the District Court was correct and the reversal of that holding by the Circuit Court of Appeals was unwarranted.

(2) The Circuit Court of Appeals erred in refusing to hold that the first petition for turn over order in this case was res judicata to the issues raised under the second petition, in view of the issues raised in the former case by petitioner that under Section 2, subsection a(21) of the Bankruptcy Act "That the provisions of Section 69 subsection d of said Act do not apply to him, and that the jurisdiction of the Superior Court of Fulton County to administer the property in the hands of its receiver UNTIL THE CLAIMS OF ALL INTERVENORS THEREIN ARE SATISFIED is not affected by the adjudication of the said S. Yoshinuma as a bankrupt" (R. 34); and under the holding by the District Court in that case "That assuming the valid appointment of the (State Court) receiver more than four months prior to the date of bankruptcy * * * the Court has no authority to require the State Court receiver to turn over the property to the receiver apointed by this Court" (R. 39-40) (R. 58, Case 359); and the holding by the United States Circuit Court of Appeals for the Fifth Circuit (136 Fed. 2d 457), after having stated "The Special Master having filed his report in which, summarizing the material evidence and carefully and correctly setting down his conclusions of law", added as a note to its opinion that part of the Special Master's findings as follows: "The bankruptcy proceeding having been instituted more than four months after the filing of the bill in the State Court, its appointment of the receiver and

his taking possession of the res in controversy, the State Court is entitled to retain jurisdiction and to ADMINISTER THE ESTATE", and in reversing the holding of the District Court in this case to that effect (R. 15, 16, 17).

The grounds of this specification being that the issue was made in the first petition for turn over order that the Bankruptcy Court was without jurisdiction to require either delivery or accounting from petitioner, and that jurisdiction of the Superior Court of Fulton County to administer the property in the hands of its receiver (petitioner) until the claims of all of the intervenors therein are satisfied was not affected by the subsequent bankruptcy proceeding (R. 34); that the District Court held, and the Circuit Court of Appeals affirmed that the State Court was entitled to retain jurisdiction and to administer the estate, and that this holding is res judicata to a second petition for turn over order seeking an accounting and partial delivery from the State Court receiver (R. 39-40), wholly inconsistent with and contrary to the holding that the "State Court is entitled to retain jurisdiction and to administer the estate" (Point in Court below, R. 12).

(3) The Circuit Court of Appeals erred in holding:

> "It must be conceded that the legal title to the res in controversy is in the trustee in bankruptcy, or will vest in him upon his appointment, which title is not affected by the prior possession of the State Court receiver; and that the original plaintiff in the State Court proceeding is an adverse claimant whose lien (whether inchoate, complete or contingent) was not invalidated by the adjudication in bankruptcy; but what about the intervenors? Some of them may be simple contract creditors without a lien upon or an interest in the property, who were not entitled to a receiver in order that the property might be forthcoming to satisfy their demands".

(Opinion on rehearing, record page 71.) We do not complain of that part of the Court's ruling that holds that the original plaintiff in the State Court proceeding is an adverse claimant whose lien was not invalidated by the adjudication in bankruptcy. In fact, we assert that the holding to that extent is correct. The holding by the Court with reference to the intervenors, however, is error because the filing and sanction of the State Court bill, the seizure of the res in controversy by the State Court, amounted to an equitable attachment and "levy" within the meaning of the term as it is used in Section 67 a of the Bankruptcy Act, for the purposes sought to be accomplished by the suit; and established an inchoate lien in favor of all creditors appearing and becoming parties in a reasonable time, thus, the intervenors are adverse claimants with a lien arising from the equitable attachment and "levy" made more than four months before bankruptcy not invalidated by the adjudication in bankruptcy and are thus adverse claimants.

This is the second time that the bankruptcy receiver and the petitioning creditors in the bankruptcy case have sought a turn over order against the State Court receiver (petitioner here). The first petition was denied by the Referee, the District Court and the United States Circuit Court of Appeals (Atlanta Flooring & Insulation Co., Inc., Et. Al. *v.* Oberdorfer Insurance Agency, Inc. and Marvin G. Russell, Receiver, 136 Fed. 2d 457), and this Court denied certiorari, 320 U. S. 786, 64 S. Ct. 189 (Case Number 359, October Term, 1943).

The present case arises from the second petition for turn over order, brought by the petitioning creditors in bankruptcy and the bankruptcy receiver, who has since been elected as trustee in bankruptcy.

(4) The Circuit Court of Appeals, after having correctly held: "If it is an insolvency proceeding, the burden is on

the appellants to show it" (opinion on petition for rehearing R. 69), and after having stated:

> "We need more facts to answer these questions; the correct answer may turn upon the proper construction of the plaintiff's petition (Petition in State Court); if it were before us in its entirety, we might determine its nature; but to expect Courts to decide cases without sufficient facts may be likened to requiring the ancients to make brick without straw".

(R. 69-70, opinion on rehearing) erred in reversing the judgment of the Court below and assessing the costs against the appellee (Petitioner here). This error extends to the entire opinion and judgment of reversal of the Circuit Court of Appeals, because the burden was on the appellants (respondents here) to furnish the evidence and proof necessary to sustain the recovery sought in the petition for turn over order, and because, it is elementary that when a party fails to carry the burden of proof resting on him, the judgment should go against him, and because the Court also overlooked the fact that the nature of the State Court proceeding was determined in the previous litigation (136 Fed. 2d 457).

V

Argument

Point One

UNDER SECTION 2 SUBSECTION A(21) (11 U. S. C. A. 11 A(21)), AS WELL AS UNDER THE STATE OF THE LAW PRIOR TO THE ENACTMENT OF THAT SUBSECTION, THE BANKRUPTCY COURT IS WITHOUT JURISDICTION, BY SUMMARY PROCEEDING, TO REQUIRE EITHER DELIVERY OR ACCOUNTING FROM A NON-BANKRUPTCY RECEIVER, WHERE THE NON-BANKRUPTCY RECEIVER WAS APPOINTED AND TOOK POSSESSION OF THE RES MORE THAN FOUR MONTHS BEFORE

BANKRUPTCY, WHERE THE BANKRUPTCY PROCEEDING IS NOT UNDER EITHER CHAPTERS X OR XII OF THE BANKRUPTCY ACT, AND THE NON-BANKRUPTCY RECEIVER NEED NOT SURRENDER ANY PROPERTY TO THE BANKRUPTCY COURT UNLESS THERE PROVES TO BE A SURPLUS OVER AND ABOVE THAT NECESSARY TO SATISFY LIENORS AND CLAIMANTS IN THE NON-BANKRUPTCY PROCEEDING.

Section 2 of the Bankruptcy Act, as now constituted is that portion of the Act which defines the jurisdiction of the Court, and subsection 21 under paragraph a thereof, provides, as a limit on the jurisdiction of the Court that the Court shall not require delivery and accounting from a non-bankruptcy receiver or trustee, except in proceedings under Chapters X and XII of the Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy.

We are unable to find any case where this Court has construed the proviso, although the Court has had before it the main part of subsection a(21) with reference to delivery and accounting where the State Court receiver was appointed within four months of bankruptcy in the case of *Emil* v. *Hanley*, 63 S. Ct. 687, 318 U. S. 515. In that case, the Court held that a receiver appointed for the collection of rents and profits in a mortgage foreclosure proceeding would not be disturbed since the lien of the mortgage, having attached more than four months prior to bankruptcy was not invalidated under Section 67 subsection a(1) of the Act. The Court, in discussing its refusal to supersede the receivership for the collection of rents and profits arising from the property subject to the mortgage lien, stated that to do so "Would lead in many cases to a division of authority between State and Federal Courts. Thus, in this case the State Court would remain in charge of the foreclosure, the Bankruptcy Court would have exclusive control

over the receiver's receipts. An interpretation which leads to a division of authority so fraught with conflict will not be readily implied."

In the case at bar, the Court's attention is called to the fact that in the first petition for turn over order against petitioner, the Courts refused to supersede the State Court proceeding (136 Fed. 2d 457), and the present turn over petition seeks the exercise of summary jurisdiction by the Court for the recovery of all of the assets in the hands of the State Court receiver (petitioner) not needed to satisfy the lien of the original plaintiff there, including his principal, interest and costs (R. 2-6), and to the fact that the United States Circuit Court of Appeals for the Fifth Circuit has rightly refused to go so far, in view of the fact that there are involved in the State Court proceeding numerous liens, which are superior in rank to that of the original plaintiff, and, of necessity, must be determined and paid, together with the costs of the proceeding, before the original plaintiff is entitled to have his lien satisfied. But the Circuit Court of Appeals went further, and in effect held that lien claimants who had not intervened in the State Court before the date of bankruptcy were not entitled to satisfaction of their liens in the State Court (Opinion November 22, 1944, R. 48), and in reversing the judgment of the District Court, instructed that Court specifically to inquire into ten different features of the proceeding, including "(2) the nature and amount of the claims propounded therein," and "(3) the character of the alleged liens therein sought to be enforced" (Opinion January 30, 1945, R. 67-8).

These specific directions and the two opinions as a whole (November 22, 1944 and January 30, 1945), if allowed to stand, would certainly lead to a division of authority between State and Federal Courts criticized by this Court in that case.

Petitioner respectfully urges that in adopting subsection a(21) as a part of Section 2 of the Bankruptcy Act, the Congress intended to define a clear and simple point at which the jurisdiction of Bankruptcy Courts end and the jurisdiction of State Courts become paramount and exclusive in cases where bankruptcy follows a proceeding in a State Court, where the bankrupt's property is in the course of administration.

The Congress, no doubt, undertook to make this clear definition as to the extent of the jurisdiction of Bankruptcy Courts in such cases in the light of the opinion by this Court in the case of *Straton* v. *New*, 283 U. S. 327, 51 S. Ct. 465, 75 L. Ed. 1098, in which case this Court surveyed the history of the litigation over this point in cases beginning with *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, and ending with the case of *International Shoe Co.* v. *Pinkus et al.* 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318.

In these cases, the details of the point involved and the State laws under which the State cases were proceeding varied, but in its broader aspects the problem was to determine when and under what circumstances subsequent bankruptcy should supersede a prior State Court receivership, where the assets of the bankrupt were being administered.

In the light of the enactment of subsection a(21) to Section 2 of the Bankruptcy Act, a study of these cases, we urge, clearly reveals the intention of Congress to so clearly define that point as to eliminate further litigation on the subject.

For instance, in the case of *Sturges* v. *Crowninshield*, *supra*, Chief Justice Marshall, in the twelfth unnumbered paragraph of his opinion said:

> "It does not appear to be a violent construction of the Constitution and is certainly a convenient one, to

consider the power of the States as existing under such cases as the laws of the union may not reach. But be this as it may, the power granted to Congress may be exercised or declined as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcy are not to be established, it does not follow that partial law may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment which is inconsistent with the partial Acts of the States."

The Court further held in that case that Congress may purposely omit to provide for many cases to which its power extends and when Congress eliminates from the effect of the Bankruptcy Act particular classes of cases or particular situations, the application of the State law is not affected by the mere existence of the power granted to Congress in Article One, Section 8 (4) of the Constitution.

Then, in the case of *Stellwagen* v. *Clum*, 245 U. S. 605, 38 S. Ct. 315, 62 L. Ed. 507, in answer to questions certified to the Supreme Court by the Circuit Court of Appeals, the Court, in headnote one, held:

"State laws to the Extent that they conflict with the laws of Congress on the subject of bankruptcy are suspended, but they are suspended only to the extent of actual conflict with the system provided by Congress. (Citing Sturges v. Crowninshield, supra and Ogden v. Saunders, 12 Wheat. 213.)"

The certified question in the case of *Stellwagen* v. *Clum* was in effect whether certain provisions of an Ohio statute were suspended by the Bankruptcy Act. The Ohio statute provided in part for the appointment of a receiver to take charge of all of the assets of a debtor in the event of any

preference or fraudulent transfers and to administer them for the benefit of all creditors. Under Headnote Five, in answer to the certified question, the Supreme Court said:

> "This State statute is not opposed to the policy of bankruptcy or in contravention of the rules and principles established by it with a power of fair disposition of the assets of the insolvent. It is only State laws which conflict with the bankruptcy laws of Congress that are suspended; those which are in aid of the Bankruptcy Act can stand. * * * and while it is not necessary to decide that there may not be insolvency laws which are suspended, although not providing for a discharge of indebtednes, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts."

In *Straton* v. *New, supra*, the possession of the *res* by the State Court was upheld, and the Court in its opinion cited the case of *Metcalf* v. *Barker*, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122, and in quoting from the latter case said that the bill in that case "was technically a creditors bill," but held that the lien there was a lien created by a levy or judgment, etc.; that would be invalidated under Section 67 f (67, Sub. a(1) 11 U. S. C. A. 107) of the Bankruptcy Act if within four months, but where more than four months have passed before the institution of the bankruptcy proceeding, that the proceeding was not only not null and void, but its validity recognized. The Court further said that a judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by Section 67 a(1), which is plainly confined to judgments creating liens.

See also the case of *Peck* v. *Jennes*, 7 Howard 612, at page 625. This was a case in which a lien by attachment

was before the State Court, which subsequent bankruptcy was held not to annul, where the Court said:

> "It follows, therefore, that the District Court had no supervisory power over the State Court either by injunction or the more summary method pursued in this case, unless it has been conferred by the Bankruptcy Act. But we cannot discover any provision in that Act which limits the jurisdiction of the State Courts, or confers any power on the Bankruptcy Court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers."

We urge that it is clear that in enacting the proviso contained in subsection a(21) of Section 2 of the Act the Congress intended to create a limitation upon the effect of bankruptcy in the cases there provided for and to limit the jurisdiction of Courts of Bankruptcy. This the Congress may do, and when it does so, the application of the State law to situations not provided for, or situations eliminated from the Act by Congress is not affected by the mere existence of the power granted to Congress in Article One, Section 8(4) of the Constitution. Such State laws are not in conflict with the laws of Congress on the subject as held in the case of *Sturges* v. *Crowninshield, supra* and *Stellwagen* v. *Clum, supra.*

It is not necessary to consider the question in this case, because the State Court proceeding in the present case is not a proceeding under a statute tantamount to bankruptcy, but we mention, in passing, that in view of the proviso in subsection a(21) of Section 2 of the Bankruptcy Act, it may be that in a case where the State Court proceeding was under such a statute, and the benefits of the Bankruptcy Act were not invoked by either the creditors or the debtor within four months of the seizure of the *res*

by a State Court receiver, the bankruptcy proceeding would not supersede the State Court proceeding. The latter statement does not concede that such a State statute could, with impunity, violate the constitutional provision against passage by the States of laws impairing the obligations of contracts.

In the case of *International Shoe Co.* v. *Pinkus, et al.*, 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318, this Court was considering an Arkansas statute which the Court held was tantamount to a bankruptcy statute. In Section 2-4 of the opinion, however, the Court said:

> "The general rule is that an intention wholly to exclude State action will not be implied, unless when fairly interpreted, an Act of Congress is plainly in conflict with State regulation of the same subject."

The general rule prevails to prevent any interference even by a Court of Bankruptcy with another Court's control over property which rightfully has been subjected to its jurisdiction, if that jurisdiction attached more than four months before the petition in bankruptcy was filed. *Pickens* v. *Roy*, 187 U. S. 177, 23 S. Ct. 78, 47 L. Ed. 128. This is predicated upon the principle that the seizure by a Court of property amounts to an equitable attachment or "levy" within the meaning of that term as it is used in Section 67 a(1) of the Bankruptcy Act. In Re: *Tyler*, 149 U. S. 164, 183, 13 S. Ct. 785, 37 L. Ed. 687; *Central Railroad* v. *Pettus*, 113 U. S. 116, 124, 5 S. Ct. 387, 28 L. Ed. 915; *Horn* v. *Pere Marquette R. Co.* (C. C.) 151 Fed. 626; *Frazier* v. *Southern Loan & Trust Co.*, 99 Fed. 707, 713, 40 C. C. A. 76, 25 Cyc. 206, and where such seizure took place more than four months before bankruptcy, the proceeding is not superseded by bankruptcy. *Metcalf* v. *Barker, supra.*

When a Court having jurisdiction of the parties and the subject matter takes possession of property, it is with-

drawn from the jurisdiction of all other Courts, and the Court in possession has ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property though such Court is not a Court of Bankruptcy, and though the property in its possession is a part of the estate of a person adjudicated a bankrupt on a petition filed after such Court acquired possession. *Murphy* v. *John Hoffman Co.*, 211 U. S. 662, 29 S. Ct. 154, 53 L. Ed. 327; *Wabash Railroad Co.* v. *Adelbert College*, 208 U. S. 38, 28 S. Ct. 182, 52 L. Ed. 379; In re: *Antigo Screen Door Co.*, 123 Fed. 249, 59 C. C. A. 284.

See also in this connection the following cases: *Hoover* v. *Mortgage Co.* (C. C. A., 9th Circuit), 290 Fed. 891; *Clements* v. *Conyers* (C. C. A., 7th Circuit), 32 Fed. (2d) 5, Cert. denied, 280 U. S. 584, 74 L. Ed. 633; *Park Lane Dresses, Inc.* v. *Haugton & Dutton Co.* (C. C. A., 1st Circuit), 54 Fed. (2d) 433; *Matter of Conservative Mortgage & Guaranty Co.* (C. C. A., 6th Circuit), 24 Fed. (2d) 38; *Muffler* v. *Pettigrew Realty Co.* (C. C. A., 6th Circuit, 1943) 132 Fed. (2d) 479, Cert. denied, 319 U. S. 766, 63 S. Ct. 1329, 87 L. Ed. 1715.

In support of this proposition, we cite also the following Circuit Court of Appeals cases for the Fifth Circuit: *Yaryan Naval Stores Co.* v. *Borchardt Co.*, 217 Fed. 758; *Blair* v. *Brailey*, 221 Fed. 1, Cert. denied, 238 U. S. 634, 59 L. Ed. 1499; *Neely* v. *McGehee*, 2 Fed. (2d) 853.

The opinion in the *Blair* v. *Brailey* case was written by Judge Sibley of the Fifth Circuit, and we recommend it to the Court as a clear statement and analysis of the principles involved and the law applicable thereto.

When this case was before this Court on the first petition for turn over order in a petition for certiorari brought in this Court by the bankruptcy receiver and the petitioning creditors in bankruptcy (Case number 359) respondent

(Petitioner here) filed a brief in this Court in opposition thereto, and, we think, discussed thoroughly all the questions involved including the nature of the State Court proceeding and inserted as an appendix to that brief all of the applicable Georgia Code Sections.

We have set out the Georgia Code Sections applicable to the State Court proceeding in this case, in an appendix hereto attached.

We respectfully pray that this Court review the brief of the respondent (petitioner here) filed in the former case.

It results, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court and in not holding that the Bankruptcy Court was without summary jurisdiction to require either delivery or accounting from the State Court or its receiver, of any property unless there should, in that Court, prove to be a surplus over and above that necessary to satisfy lienors and claimants in that Court, and not then unless the State Court refused to deliver such surplus as might be determined in that Court to exist.

Point Two

IT WAS AN ERROR AND A VIOLATION OF PETITIONER'S RIGHTS, UNDER THE PRINCIPLES OF RES JUDICATA AND ESTOPPLE BY JUDGMENT TO REFUSE TO HOLD THAT THE FIRST PETITIONER FOR TURN OVER ORDER IN THIS CASE WAS RES JUDICATA TO THE SECOND, PRESENT, PETITION FOR TURN OVER ORDER AND TO APPLY THE PRINCIPLES OF ESTOPPLE BY JUDGMENT.

In the first petition for summary turn over order the issue was made that the Bankruptcy Court was without jurisdiction to require either delivery or accounting from the petitioner and that the jurisdiction of the Superior Court of Fulton County to administer the property in the hands of its receiver until the claims of all of the intervenors therein are satisfied was not affected by the subsequent bankruptcy

proceedings (R. 34). In that proceeding, the District Court held, and the Circuit Court of Appeals affirmed, that the State Court was entitled to retain jurisdiction and to administer the estate. The District Court in that proceeding declared:

> "Assuming the valid appointment of the (State Court) receiver more than four months prior to the date of bankruptcy * * * the Court has no authority to require the State Court receiver to turn over the property to the receiver appointed by this Court."

The Circuit Court of Appeals affirmed that decision, and stated in its opinion:

> "The Special Master having filed his report in which, summarizing the material evidence and carefully and correctly setting down his conclusions of law"

added as a note to its opinion, the Special Master's findings as follows:

> "The bankruptcy proceeding having been instituted more than four months after the filing of the bill in the State Court, its appointment of the receiver and his taking possession of the res in controversy, the State Court is entitled to retain jurisdiction and to ADMINISTER THE ESTATE."

(Capital ours) (136 Fed. 2d 457). In his conclusions of law, also quoted in a note to the above opinion, the Special Master cited volume one, Collier on Bankruptcy, 14th Edition, pp. 299, 304, 305, as follows:

> "Where the non-bankruptcy receiver or trustee was appointed more than four months before the filing of the bankruptcy petition, the receivership or trustee proceeding will not be superseded (except in Chapters X and XII proceedings), and the receiver or trustee NEED NOT SURRENDER ANY PROPERTY to the Bankruptcy Court, unless there proves to be a surplus over and above that necessary to satisfy lienors and claimants

in the non-bankruptcy proceeding. The theory here is that an equitable attachment or lien not invalidated by Section 67 a arises in favor of creditors instituting action for the appointment of a receiver and the State Court so appointing will be permitted to administer the assets for the satisfaction of liens and claims. If, however, the receivership or trusteeship is initiated under a State statute which is in effect a State insolvency law tantamount to bankrupcy legislation, then such receivership would be superseded by bankruptcy, whether or not within the four months limit prescribed by clause 21 as such proceedings are utterly null and void."

The nature of the State Court bill was before the Court in that proceeding and the Court held against the contention that it was an insolvency proceeding tantamount to bankruptcy.

The recovery sought in the present summary proceeding is for a part of the property in the hands of the State Court receiver and it is sought to supersede intervenors in that suit asserting liens and claims, and as is clearly shown by the answer in the prior proceedings filed by the State Court receiver, in which he asserted the jurisdiction of the Court appointing him to administer the property in his hands "Until the claims of all intervenors therein are satisfied", and by the opinion of the Special Master and his findings of law, by the opinion of the District Court in making the findings of the Special Master the order and judgment of that Court and by the opinion of the Circuit Court and the notes thereunder, the rights of the intervenors in the State Court proceeding to assert their liens and claims there and to a satisfaction thereof in the State Court have previously been adjudicated in favor of petitioner and against respondents.

The Special Master, after citing the text in Collier on Bankruptcy that "The receiver or trustee (non-bankruptcy)

need not surrender any property to the Bankruptcy Court, unless there proves to be a surplus over and above that necessary to satisfy lienors and claimants in the non-bankruptcy proceeding", in his own language said: "The State Court is entitled to retain jurisdiction and to administer the estate"; that the District Court in making that finding the order and judgment of that Court could not have misinterpreted the full scope of such a holding is clearly shown by the language the District Court used at that time quoted above, and that the Circuit Court of Appeals could not, at that time, have misinterpreted the full scope of the issues involved is shown by the statement in the opinion in that case holding that the Special Master had summarized the material evidence and carefully and correctly set down the conclusions of law and in incorporating in a note to the opinion quotation from the opinion of the Special Master that "The State Court is entitled to retain jurisdiction and to administer the estate", and copying the excerpts from the text upon which the Special Master based his findings (quoted above).

See 30 Am. Jur. pp. 920-923:

> "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involved the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also

immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes and seek different relief."

See, also, 30 Am. Jr. Section 179, beginning at page 923:

"The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such cases extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule also applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."

Certainly, the effort in the second petition for turn over order in this case to supersede the State Court proceeding as to a part of its jurisdiction and as to a portion of the funds in the hands of its receiver was within the purview of the first petition for a summary turn over order, wherein it was sought to supersede entirely the State Court proceeding and recover all of the funds in the hands of the State Court receiver.

The State Court receiver insisted in the prior proceeding that "the jurisdiction of the Superior Court of Fulton County to administer the property in the hands of its receiver UNTIL THE CLAIMS OF ALL INTERVENORS THEREIN ARE SATISFIED is not affected by the adjudication of the said S. Yoshinuma as a bankrupt." Thus, the issues were sufficiently broad in the prior proceeding so that with the exercise of due diligence respondents could have presented in that proceeding everything they seek to present in the present proceeding.

The respondents did so and the questions raised in the present proceeding were actually passed upon in the prior proceeding. (See above.)

This question of res judicata was raised in the District Court and in the Circuit Court of Appeals, was argued in petitioner's brief and insisted upon in his petition for rehearing.

The adjudication on the first petition for turn over order was a determination that the Bankruptcy Court did not have summary jurisdiction, and it was determined on the merits as shown above.

A judgment on the merits concludes the parties and their privies, not only as to things determined, but as to matters which might have been litigated. *Grubb* v. *Public Utility Commission of Ohio*, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972.

Any right, fact, or matter in issue and directly adjudicated, or necessarily involved in determination of action before competent Court in which judgment has been rendered on merits, is conclusively settled by judgment therein and cannot be litigated between the same parties and their privies, whether claim, demand, purpose, or subject matter of two suits is same or not. See *Henderson* v. *U. S. Radiator Corp.*, 78 Fed. 2d 674, Cert. denied 296 U. S. 635, 56 S. Ct. 157, 80 L. Ed. 452; *City of Boston* v. *McGovern* (C. C. A. Mass. 1923), 292 Fed. 705, Cert. denied 265 U. S. 581, 44 S. Ct. 456, 68 L. Ed. 1190.

The estopple arising from a finding in a previous suit between the same parties extends to a decision of the legal rights of the parties on a state of facts common to both suits, although the causes of action are different. See *Southern Minnesota Railway Extension Co.* v. *St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249. Where the finding of fact on which a conclusion of law is based can be ascertained with certainty from the judgment roll, such find-

ing will constitute an estopple. *Doyle* v. *Hamilton Fish Co.*, 234 Fed. 47, 148 C. C. A. 63, Cert. denied 243 U. S. 649, 37 S. Ct. 476, 61 L. Ed. 946.

Principles of res judicata apply to questions of jurisdiction as well as to other issues (C. C. A. W. Va., 1935 *Hamilton Gas Co.* v. *Watters*, 79 Fed. 2d 438.

Where a second action is on the same cause of action and between the same parties as a first action, the judgment in the former action is conclusive in the latter as to every question which was or might have been presented and determined in the former. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 47 S. Ct. 600, 71 L. Ed. 1069.

Where the parties and cause of action were the same as in a prior suit, and every obligation urged in the subsequent suit was open, within the legitimate scope of the pleadings in the first suit, and might have been presented at that trial, the matter to be considered as having passed in rem judicatam, and the former judgment would be deemed conclusive between the parties. *Gould* v. *Evansville and C. R. Co.*, 91 U. S. 526, 23 L. Ed. 416.

It results, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court and in not holding that under the issues and facts involved and the judgments upon the first petition for turn over order were res judicata and conclusive upon the recovery sought in the second petition for turn over order.

Point Three

Title of the bankruptcy trustee and the limit on his right to possession as against a non-bankruptcy receiver.

Our specification of error number three complains of the holding by the Circuit Court of Appeals "that it must be conceded that the legal title to the res in controversy is in the trustee in bankruptcy, or will vest in him upon his ap-

pointment, which title is not affected by the prior possession of the State Court receiver, and that the original plaintiff in the State Court proceeding is an adverse claimant whose lien (whether inchoate, complete or contingent) was not invalidated by the adjudication in bankruptcy; but what about the intervenors? Some of them may be simple contract creditors, without a lien upon or an interest in the property, who were not entitled to a receiver in order that the property might be forthcoming to satisfy their demands."

We do not complain of that part of the Court's ruling that holds that the original plaintiff in the State Court proceeding is an adverse claimant whose lien was not invalidated by the adjudication in bankruptcy. In fact, we assert that the holding to that extent is correct.

The title of the trustee in bankruptcy is, by the opening statement is Section 70 of the Bankruptcy Act (11 U. S. C. A. 110 a) restricted to "the title of the bankrupt as of the date of the filing of the petition in bankruptcy."

The trustee in bankruptcy cannot acquire a greater right or interest in bankrupt's property than that which belonged to the bankrupt. *Martin* v. *New York Life Insurance Co.* (C. C. A. Ill., 1939), 104 Fed. 2d 573, Cert. denied 308 U. S. 594, 60 S. Ct. 123.

The transferability of the property by the bankrupt, prior to the time of the filing of the petition, is the controlling factor in determining what property vests in the trustee. *Horton* v. *Moore* (C. C. A. Mich., 1940), 110 Fed. 2d 189, Cert. denied 311 U. S. 692, 61 S. Ct. 75, 85 L. Ed. 448.

The provision in Section 70 of the Act that "The title of the trustee shall not be affected by the prior possession of receiver or other officer of any Court" must be read in connection with the provisions of Section 67 a(1) of the Act, providing for the avoidance of liens obtained within four

months of bankruptcy and to the universal decisions of all of the Courts that the possession of the State Court will not be interfered with when the State Court is enforcing a valid lien more than four months old at the time of bankruptcy. This latter is conceded in the opinion of the Circuit Court of Appeals in this case and has been decided in the case of *Straton* v. *New*, *supra*, and numerous other cases.

The holding by the Court with reference to the intervenors, however, is error because the filing and sanction of the State Court bill, the seizure of the res in controversy by the State Court, through its receiver, amounted to an equitable attachment and "levy" within the meaning of that term as it is used in Section 67 a of the Bankruptcy Act for the purposes sought to be accomplished by the suit (Citations as to this point are set up in this argument under Point One); and establishes an inchoate lien by statute in favor of all creditors who appear and become parties within a reasonable time. We have previously discussed in this argument, under Point One, the principle that the seizure of the res amounts to an equitable attachment and "levy," and we will not repeat that discussion under this Point; however, we urge that an equitable lien is also created in favor of any who, by reason of the filing of the original bill may become parties to that bill and assert their claims against the res in the hands of the receiver.

Bouvier's Law Dictionary, page 711, defines a "lien" as "A hold or claim which one person has upon the property of another as security for some debt or charge," and further states that "In its most extensive significance, the term lien includes every case in which real or personal property is charged with the payment of a debt or duty; every such charge being denominated a lien on the property."

Georgia Code Section 37-407 for 1933, as amende provides:

> "Creditors petition may be filed at the instance any creditor, the privilege being extended to all appear and become parties within a reasonable time

. The State Court petition in this case, the appointme of the receiver thereunder and his seizure of the *res* controversy, all having taken place more than four mont prior to the filing of the involuntary petition in bankrupte created an inchoate right or lien, stated by the statute abo quoted, in all creditors as of the date of the filing and san tion of the original bill and the seizure of the property b the receiver for the purposes of the bill, who appear an become parties to the bill within a reasonable time. Thus the property seized by the State Court receiver was, by th original action, charged with the payment of the debt o any creditor subsequently intervening. The creditor's righ to intervene existed from the date of the filing of the bill The property seized was subject to the enforcement of hi claim from the date of the seizure of the property.

This Court has held, in a case arising in Georgia, tha the existence of an inchoate lien, even though a subsequent proceeding is necessary to enforce the lien, is not invali- dated by a subsequent bankruptcy petition, filed more than four months after the inchoate lien attaches. See *May* v. *Henderson,* 268 U. S. 111.

Thus, the State Court receiver was, from the time of his seizure of the *res,* a trustee in possession of property not only for the benefit of the original plaintiff, but for the benefit of subsequent intervenors. Such a creditor, though he may have been otherwise unsecured and without a lien, by his intervention obtained the right to have the property in the hands of the receiver charged with the payment of

his debt, and this right related back to the original inchoate right that he had to intervene and become a party, stated by the Code Section and established by the filing of the original State Court bill.

On Page 14, Bouvier's Law Dictionary, it is further said:

> "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer property as security, creates an equitable lien upon the property so indicated, which is enforcible against the property."

Yoshinuma, the defendant in the State Court proceeding, and subsequently adjudicated a bankrupt, acknowledged service of the petition and process in the State Court case consented to making the receivership permanent and to a sale of the assets in the hands of the State Court receiver under such equitable terms and conditions as might be fixed by the State Court. (This consent appears in the record in the former petition for turn over order at page 11, case #10,626, in the United States Circuit Court of Appeals for the Fifth Circuit; case #359, October term, 1943, in this Court.) This consent was an agreement that the fund arising from the sale of the property was to be held by the permanent receiver subject to the claims of creditors who became parties to the State Court bill.

This consent related back to the time of the filing of the original petition in the State Court. *Hardin, et al.* v. *Dodd, et al.*, 176 Ga., 119; *McLeod* v. *McLeod*, 144 Ga. 359, 361; *Waldon* v. *Maryland Casualty Co.*, 155 Ga. 76. This Court defined a lien in the case of *Peck* v. *Jennes*, 48 U. S. 612, 7 Howard, 612, 12 L. Ed. 841, as follows:

> "At common law a 'lien' is defined as a right in one man to retain that which is in his possession belonging

to another, until certain demands of persons in possession are satisfied."

See also *In Re: Hamburgher Distillery*, 115 Fed. 2d 84, (C. C. A., Pa.).

The possession of the *res* by the receiver in the State Court from the date of his seizure more than four months before bankruptcy was in behalf of all creditors who might subsequently appear and become parties to the State Court proceeding in a reasonable time.

In 37 Corpus Juris, page 306, it is said:

> "The word 'lien' is a French word, of the same origin as the word 'liability' and originally signified a 'string,' a 'tie,' a 'bind' * * * the word 'lien' as used in law is a technical term and has a fixed and well understood meaning. In a narrow and limited sense as defined at common law, it signigies the right by which a person in possession of personal property holds and retains it against the owner until a demand due to the party retaining it is satisfied. * * * In its broadest sense and common acceptation it is understood and accepted to denote a legal claim or charge on property, either real or personal, as security for the payment of some debt or obligation; a hold or claim which one person has upon the property of another as security for some debt or charge, although the property is not in the possession of the one to whom the debt or obligation is due. It includes every case in which personal or real property is charged with the payment of a debt."

It results, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court and in not holding that the Bankruptcy Court was without summary jurisdiction to require either delivery or accounting from the State Court or its receiver, of any property, unless there should, in that Court, prove to be a surplus over and

above that necessary to satisfy lienors and claimants in that Court and not then unless the State Court refused to deliver such surplus as might be determined in that Court to exist.

Point Four

IT WAS ERROR TO HOLD THAT THE BURDEN WAS ON THE RESPONDENT AND TO REVERSE A DECISION IN FAVOR OF THE PETITIONER AND ASSESS THE COSTS AGAINST HIM RECAUSE OF THE FAILURE OF THE RESPONDENT TO SUBMIT SUFFICIENT PROOF.

The United States Circuit Court of Appeals held that the burden was on the petitioning creditors and the bankruptcy receiver in this case and that they had failed to carry that burden and upon that premises, it was error to reverse a judgment in favor of the State Court receiver (petitioner) and assess the costs against the State Court receiver.

At page 4 of the opinion on rehearing (R. 69), the Circuit Court of Appeals held:

> "If it is an insolvency proceeding, the burden is on the appellants to show it,"

and, at page 5 of the opinion (R. 69-70), the Circuit Court said:

> "We need more facts to answer these questions; the correct answer may turn upon the proper construction of the plaintiff's petition (Petition in the State Court); if it were before us in its entirety, we might determine its nature; but to expect Courts to decide cases without sufficient facts may be likened to requiring the ancients to make brick without straw."

The holding that the burden was on the petitioning creditors and the bankruptcy receiver was correct, but it was error to reverse a decision in favor of the State Court receiver and assess the costs against him upon the failure of his opponents to carry the burden which rested upon them.

> "Where proven facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against the party having the burden of proof."

Pennsylvania Railroad Co. v. *Chamberlain,* 288 U. S. 333, 53 S. Ct. 391, 71 L. Ed. 819.

> "Allegations in bill which were not sustained by any evidence furnish no basis for recovery by plaintiff."

Astor v. *Wells,* 17 U. S. 466, 4 Wheat. 466, 4 L. Ed. 616.

> "Person having burden of proof does not sustain it where evidence leaves fact to be proved conjectural."

Deadrich v. *U. S.* (C. C. A. Nev. 1935) 74 Fed. 2d 619.

> "Verdicts cannot rest upon guess or conjecture and a Court that is left without knowledge of a fact, after exploring to the full every channel of information must decide against the litigant who counts upon the fact as an essential of his claim."

Shapleigh v. *United Farms Co.* (C. C. A. Texas, 1939) 100 Fed. 2d 287.

> "Judgment must go against party on whom rests necessity of showing that he is entitled to recover where there is uncertainty as to inferences which may fairly be drawn from the evidence."

Spain v. *Powell* (C. C. A. Va. 1937) 90 Fed. 2d 580.

It results, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court, and in not holding that the burden of proving the facts necessary to recovery rested upon the petitioning creditors in bankruptcy and the bankruptcy receiver, and that they, not having submitted sufficient proof to the Court to entitle them to recover, that the judgment should go against them.

Conclusion

For the reasons assigned in the petition for certiorari and in this brief, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers; that the writ of certiorari should be granted; and that, after full consideration, the judgment and decision of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

H. A. Alexander,
Benton E. Gaines,
Joseph J. Fine,
Attorneys for Petitioner.

Addresses:

H. A. Alexander,
1st National Bank Bldg.,
Atlanta 3, Georgia;

Benton E. Gaines and
Joseph J. Fine,
958 Hurt Building,
Atlanta 3, Georgia.

APPENDIX ONE

Georgia Code Section for 1933, as Amended:

Section 37-401: Legal and Equitable Assets.—Assets are either legal or equitable; the former are such as may be reached by the ordinary process of law; the latter are such as can be reached only through the intervention of equity. The former, when properly before the court, shall be distributed according to legal liens and priorities; the latter, according to justice and right in the particular case, the general rule being that equality is equity.

APPENDIX TWO

Georgia Code Section for 1933, as Amended:

Section 37-405: Marshaling Assets.—In All cases where legal difficulties shall arise as to the distribution of assets in payment of debts, or where, from any circumstances, the ordinary process of law would interfere with the due administration, without fault on the part of the representative of the estate, a petition to marshal the assets shall be maintained at his instance.

APPENDIX THREE

Georgia Code Section for 1933, As Amended:

Section 37-407: Creditors' Petitions.—Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties in a reasonable time.

APPENDIX FOUR

Georgia Code Section for 1933, As Amended:

Section 37-408: Equitable Assets for Creditors.—Equitable assets may be reached by a creditor in every case

where he shows that there is danger of not being satisfied out of legal assets.

APPENDIX FIVE

Georgia Code Section for 1933, as Amended:

Section 37-410: Time Limit for Intervention Where Assets are Being Disposed of by Court.—In all equity cases now pending, or hereafter pending, in the superior Courts of this State, wherein assets of either or both parties to the cause are being administered, marshaled or otherwise disposed of by the court, the court, upon motion of either party to the case, or, on its own motion at least 60 days before the trial term, shall pass an order to be entitled in the cause and addressed to all parties concerned, requiring all parties claiming an interest in said assets to intervene in the cause not later than a certain date, which is to be fixed by the court, of not less than 60 days from the date of the order and not more than 90 days from the date thereof, and after such order is so passed the same shall be published in the newspaper in the county, in which the case is pending and in which the sheriff's advertisements are published, twice a month for two consecutive months. After said order has been so passed and published and after the expiration of the time for intervening, as fixed by the order, all parties interested in said assets shall be forever barred from intervening in the case.
(Acts 1939, p. 344.)

APPENDIX SIX

Georgia Code Section for 1933, as Amended:

Section 55-309: Accounting to Court Appointing Receiver.—The receiver is an officer and servant of the court appointing him, is responsible to no other tribunal than said court, and must in all things obey its direction.